No. 3808

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PETER SEKINOFF,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT FOR THE TERRITORY OF ALASKA, DIVISION NUMBER ONE.

Petition for Rehearing

JAMES WICKERSHAM,
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TO THE HONORABLE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT:—

The undersigned, the plaintiff in error, petitioner, respectfully submits that he has been aggrieved by an opinion of your Honors rendered herein on the 7th day of August, 1922, in the re-

spects hereinafter set forth, and prays for a rehearing of said matter upon the following grounds:

(1) That an indictment was returned against this petitioner in the District Court for the Territory of Alaska, First Division, on October 11, 1921, for the crime of statutory rape charging that the defendant did—

"being then and there over the age of sixteen years, knowingly, wilfully, wrongfully, unlawfully, feloniously, carnally know and abuse Sonia Malachoff, the said Sonia Malachoff being then and there a female person and then and there under the age of sixteen years, to-wit, of the age of eleven years," etc.

(Page 2. Transcript of Record.)

(2) That on the trial of this petitioner in said court on said charge on the 20th day of October, 1921, the jury drawn to try the case returned a verdict therein against this petitioner, defendant there, as follows:

"We, the jury empaneled and sworn in the above-entitled cause, find the defendant guilty of assault with intent to commit Rape.

Dated at Juneau, Alaska, this 20th day of October, 1921.

"J. C. READMAN, Foreman."

(Page 164. Transcript of Record.)

(3) That thereafter and on November 2nd, 1921, the judge of the trial court passed sentence

and judgment against this petitioner that he was "guilty of the crime of Assault with intent to commit Rape", and sentenced petitioner to serve six years in the United States Penitentiary at McNeil's Island, in the State of Washington, where petitioner is now confined.

(4) That upon the matters and things shown and stated in the printed transcript of record in this cause, in this court, the said cause was removed from the trial court to this court for review upon the errors alleged therein to have occurred at the trial in the court below, and upon the briefs filed herein by the respective attorneys in this cause, the Honorable Judges of this court did consider said alleged errors and the other matters therein and did on the 7th day of August, 1922, render and file their opinion herein, and did therein and thereby affirm the judgment and sentence against this petitioner for the reasons and conclusions stated in said opinion.

(5) That through inadvertence and mistake the said opinion does not correctly or at all decide the matters at issue in said cause as presented to the judges of this court in the Assignment of Errors and Briefs of Counsel, and by reason whereof the judges did in said opinion declare and decide as follows:

"There was abundant evidence to sustain the

verdict of the jury to the effect that the defendant attempted to commit the crime distinctly charged in the indictment against him and distinctly defined in the second clause of Section 1894 of the Statute of Alaska above set forth, and that in such attempt he committed acts toward the commission of that crime, the punishment for which is declared in Section 2073 of the Alaska statute above cited. And we think it clear that such attempt is necessarily included in the crime charged against the defendant by the indictment by virtue of Sections 2269 and 2268 of the Alaska laws that have been quoted.

"Finding no substantial error in the instructions complained of, the judgment is AFFIRMED."

(6) That the inadvertence, error and mistake made by this court in the foregoing excerpt from the court's opinion consists in this, to-wit: (a) Because there was no verdict of a jury in this cause to the effect that the defendant attempted to commit the crime distinctly charged in the indictment against him and distinctly defined in the second clause of section 1894 of the statute of Alaska above set forth, and that in such attempt he committed acts toward the commission of that crime, the punishment for which is declared in section 2073 of the Alaska statute above cited, or at all; that the only verdict of a jury in this cause is that verdict set forth in the Transcript of Record in this cause at

page 164, and was and is to the effect that the defendant had committed the crime of Assault with intent to commit Rape, and not the crime of Attempt to commit the statutory rape charged in the indictment. (b) Because the trial court did not instruct the jury below that "such attempt is necessarily included in the crime charged against the defendant by the indictment by virtue of sections 2269 and 2268 of the Alaska laws that have been quoted," and the neglect and refusal of the trial court to so instruct the jury and to submit to the jury the included crime of Attempt to commit Rape, and the lesser offenses included in the crime charged in the indictment was and is one of the errors alleged in petitioner's Assignment of Errors; and this court in the above excerpt from its opinion mistakes the fact in respect to that matter, by assuming it was done, when in fact it was not done, and the refusal to do it was clearly stated as error in petitioner's Assignment of Errors numbers 4, 5, 6, 8 and 9. (c) Because the above excerpt from the court's opinion mistakenly assumes that the petitioner was found guilty of the crime of Attempt to commit the crime of Rape, a crime necessarily included in that for which petitioner was so indicted, when he was in fact found guilty by the verdict of the jury of the crime of Assault with intent to commit Rape, a crime which is NOT in-

cluded in that with which he was charged in the indictment, and the difference between which two crimes is the principal point of contest in his Assignment of Errors, and Brief and Argument before this court. (d) Because by reason of the aforesaid inadvertence and mistake this court has affirmed a conviction against defendant for a crime which the lower court refused to submit to the jury, and for which he was not found guilty by the jury. (e) Because by reason of the aforesaid inadvertence and mistake this court has not given weight to or decided upon the other assigned errors of the court below which are argued and submitted to this court in the briefs in this cause for its opinion and decision thereon.

(7) Among the errors of the lower court assigned and argued to this court in this cause and which were not noticed, or if noticed, were mistakenly treated, are the following:

(a) Relating to Attempts

The lower court did not submit to the jury the question of whether or not defendant was guilty of the crime of Attempt to commit the crime charged against him in the indictment, or attempt to commit the lesser degrees thereof necessarily included therein, under sections 2073, 2268 and 2269 of the laws of Alaska referred to in the court's opinion, but did specifically and affirmatively wholly with-

draw any consideration in relation to said Attempts from said jury by his Instructions numbered 14.

(Page 156. Transcript of Record.)

Defendant reserved an exception to this action of the court in his exception to Instruction XI, where the error first occurred, and assigned error therefor in his various assignments numbered 1, 4, 5, 6, 8 and 9.

This alleged error was fully presented in Brief of Plaintiff in Error, pages 23-26.

Aside from the mistake of facts, in relation thereto the court's opinion on the matter of Attempts in this case is acquiesed in by counsel for the defendant, who quite approve that part of the opinion saying (italics mine):

"*And we think it clear that such attempt is necessarily included in the crime charged against the defendant by the indictment by virtue of Sections 2269 and 2268 of the Alaska laws that have been quoted.*"

Unfortunately for the defendant, however, the lower court took the opposite view of the matter and not only did not give such instruction to the jury but withheld it by his instruction number 14, wherein he limited the jury's power as follows:

"XIV"

"I hand you three forms of verdict—1. finding the defendant guilty as charged in the indict-

ment; 2. finding the defendant guilty of assault with intent to commit rape; and, 3. not guilty. When you retire you will elect one of your number as foreman, and he will sign the form of verdict agreed upon and return the same into court."

(Page 156. Transcript of Record.)

This instruction shows that the lower court may have mistaken the element of "assault" for that of "attempt" and that he instructed the jury on "assault", an element which was not necessarily or at all included in the crime charged in the indictment, and did not charge on the element of "attempt", about which this court says "we think it clear that such attempt is necessarily included in the crime charged against the defendant by the indictment by virtue of Sections 2269 and 2268 of the Alaska laws that have been quoted."

The Supreme Court of Kansas in a similar case said (italics mine):

"In a prosecution for statutory rape, where there was evidence tending to show no more than an attempt, it was held to be the duty of the court to instruct the jury as to the law of attempt to commit the offense, *although the defendant had not asked for such an instruction.*"

State vs. Grubb, 55 Kan. 678; 41 Pac, 951.

State vs. Langston, 106 Kan, 672; 189 Pac. 153.

(Page 25, Brief of Plaintiff in Error.)

(b) Relating to Assault With Intent

The lower court instructed the jury in his Number XI, "that the crime of assault with intent to commit rape is necessarily included in the crime of rape as charged in the indictment in this case," etc., and in instruction XIII, further charged the jury that if they found that "the defendant, with intent to have sexual intercourse with the said Sonia Malachoff and having the apparent present ability to consumate said act laid hands on the said Sonia Malachoff in pursuance of said intent, or did some act toward the accomplishment of the act intended and was prevented from accomplishing the full act of rape, as I have heretofore instructed you, by causes outside of the will of the said defendant then the defendant would be guilty of the crime of assault with intent to commit rape and you should render your verdict accordingly," etc..

(Page 155. Transcript of Record.)

Defendant reserved exceptions to both those instructions (Pages 156-159, Transcript of Record), and also requested:

"Defendant's request for Instruction No. 2.

"Under the law of Alaska, the crime of rape may be committed forcibly, or, in the case of a child under the age of sixteen years, the mere act of sexual intercourse, even though such child consented thereto, if proved, constitute what is called statu-

tory rape. In this case the indictment does not allege that force was employed, and it is therefore, presumed that the act, if committed as alleged, was done with the consent of such child. Under these circumstances, I charge you that you cannot return a verdict finding the defendant guilty of assault with intent to rape or assault, and your verdict must be either guilty or not guilty of the crime charged in the indictment."

This requested instruction was refused and an exception taken.

(Page 162. Transcript of Record)

Assignment of error was based thereon.

(Page 171. Transcript of Record.)

And the matter was presented in the Brief for Plaintiff in Error, pages 18-23.

Section 1894 of the Compiled Laws of Alaska, 1913, was section 14 in Carter's Annotated Alaska Codes, 1900, and was taken by Congress in its compilation of the Penal Code of Alaska, of March 3, 1899, from Bate's Anno. Ohio Statutes, Sec. 3816. See annotations to Sec. 14 and 15, Penal Code Alaska 1899, in Carter's Codes, page 4, 1900.

Now before Section 14, Carter's Codes, being Sec. 1894, Compiled Laws Alaska, 1913, was borrowed by Congress in 1899 from Section 6816, Bate's Anno. Ohio Stat. it had received construction by the Supreme Court of Ohio in the case of

Smith v. State, 12 Ohio State, 466, where the court decided (syllabus):

"An attempt by a male person of the age of seventeen years and upward, to carnally know and abuse a female child under the age of ten years, *with her consent*, is not indictable under the 17th section of the 'Act providing for the punishment of crimes,' as an *assault* with intent to commit rape."

The last clause of the fifth section of the same statute is the Ohio statutory equivalent of the last clause of section 14, Carter's Annotated Codes and Section 1894, Compiled Laws of Alaska, 1913, and is stated in Smith v. State, supra, page 469, as follows (with italics by Ohio Supreme Court):

"If any male person of the age of seventeen years and upwards, shall carnally know and abuse any female child, under the age of ten years, *with her consent*, every such person so offending, *shall be deemed guilty of rape*," etc.

Counsel has not been able to examine this clause in Sec. 6816, Bates Annotated Ohio Statutes, from which in 1899 Congress borrowed it for Alaska, but the form quoted by the Supreme Court of Ohio in the case of Smith vs. The State, supra, is identical in meaning though differing slightly in phraseology from the Alaska form. Whether the Ohio form in Bate's Annotated Ohio Statutes, Sec. 6816 is more nearly identical with our section, counsel cannot

say, but it is certain that in the exact sense of our statute it was construed by the Supreme Court of Ohio in the Smith case at the December Term, 1862, of that court. And our Congress borrowed it in 1899 and inserted it in the Alaska Statutes with knowledge of its construction, for the case of Smith v. The State, 12 Ohio State, 466, is cited as an annotation to Section 18, Carter's Codes, in relation to assault with intent to commit rape, in 1900.

Where an English statute is adopted into our legislation, the known and settled construction of it by courts of law is received as authority.

Tucker v. Oxley, 5 Cranch, 34; 3 L. Ed. 29.

Pennock v. Dialogue, 2 Pet. 1; 7 L. Ed. 327.

Cathcart v. Robinson, 5 Pet. 264; 8 L. Ed. 120.

McDonald v. Hovey, 110 U. S. 619; 28 L. Ed. 269.

Warner v. Texas Ry. Co. 164 U. S. 418; 41 L. Ed. 405.

The known and settled construction of laws by courts of the state from which they are taken is presumed to be adopted with the adoption of the laws.

Brown v. Walker, 161 U. S. 591; 40 L. Ed. 819.

The adoption by Congress of a state statute includes the adoption of construction previously given to it.

Willis v. Eastman Trust Co. 169 U. S. 295; 42 L.

Ed. 752.

A statute taken from another state will be presumed to be taken with the meaning it had there.

Henrietta Min. Co. v. Gardner, 173 U. S. 123; 43 L. Ed. 637.

The rule ordinarily followed in construing statutes is to adopt the construction of the courts of the country by whose legislature the statute was originally adopted. In this case the court follows the construction of the state which was the source of the statute, to-wit, Massachusetts; not that of the state from which the statute was immediately taken, to-wit, California.

Coulam v. Doull, 133 U. S. 216; 33 L. Ed. 596.

The courts of the Indian Territory are bound to respect the decision of the Supreme Court of Arkansas interpreting the laws of that state which were adopted and extended over the Indian Territory by the Act of Congress of May 2, 1890.

Robinson & Co. v. Belt, 187 U. S. 41; 47 L. Ed. 65.

And this court, in a well considered case from Alaska held: "A statute adopted from another state which has been construed by the highest court thereof is presumed to be adopted with the construction thus placed upon it."

Jennings v. Alaska Treadwell Co. 170 Fed. 146, 95 C. C. A. 388.

In this case the court further said:

"It is true the two stautes are not identical as a whole, but the change in the Alaska code from the Oregon code makes more definite and certain the purpose of Congress," etc.

Jennings v. Alaska Treadwell Co., supra, page 149.

Where a statute of a state is adopted by another state or by Congress, the construction previously given to such statute by the highest court of that state presumably becomes a part of the law so adopted.

Love v. Pavlovich, 222 Fed. 842; 138 C. C. A. 268.

Mustard v. Elwood, 223 Fed. 225; 138 C. C. A. 467.

Counsel for petitioner, then, assume that this court will be bound to accept, in this case, that construction given Sec. 1894 by the Supreme Court of Ohio in the foregoing case of Smith v. The State, 12 Ohio State, 466.

Counsel in this case must share in whatever mistake has been made in the correct understanding of the issues presented in the argument, for in the Brief of Defendant in Error, page 9, the United States Attorney declared, in reference to Sections 1894 and 1898, Compiled Laws of Alaska, 1913, that—

"These two sections were borrowed bodily from the Oregon Code"—and thereupon undertook to bind us by quoting Judge Wolverton's decision in State v. Sargent, 49 Pac. 889—an Oregon case. In

the Reply brief for plaintiff in error, counsel for defendant pointed out to the court that those two sections had not been borrowed from the Oregon laws at all, and suggested the apparent relationship between Sec. 1894, Alaska, and Sec. 177, Rev. Laws of Nevada, 1912, and cited State v. Pickett, 11 Nev. 255, 21 Am. Dec. 754, Book 35 Pacific State Reports.

(Reply Brief for Plaintiff in Error, pages 13-16.)

The United States Attorney, discovering he had made a mistake, prepared a telegram and asked counsel for defendant to sign it with him, and forwarded it to the Clerk of this court, on March 29, 1922, as follows:

"Juneau, March 29, 1922.

"Frank D. Monckton,

"Clerk U. S. Circuit Court of Appeals,

"San Francisco, Cal.

"Section fifteen Alaska Penal code in Carter's Annotated Alaska Codes cites Bates Annotated Ohio Statutes section sixty-eight seventeen as origin of section eighteen ninety-four and eighteen ninety-eight compiled laws of Alaska about which discussion in Sekinoff against United States. Will you advise Judges for us.

"A. G. SHOUP, U. S. Attorney,

"JAMES WICKERSHAM, Attorney for Plaintiff in Error."

and thereupon on the following day counsel for plaintiff in error sent the following telegram to the Clerk of this court:

"Frank D. Monckton,

"Clerk U. S. Circuit Court Appeals,

"San Francisco, Cal.

"In view of agreement counsel case Sekinoff against United States pending after argument that Alaska Statute section eighteen ninety-four Compiled Laws under which Sekinoff indictment was drawn came from Ohio Statutes may I properly call attention of court to case Smith against State twelfth Ohio State Reports page Four sixty-six. United States Attorney notified.

"JAMES WICKERSHAM."

The Clerk of the Circuit Court of Appeals made written acknowledgment of the receipt of both telegrams, one on March 30, and on March 31, the second, as follows (omitting headings):

"March 31, 1922.

"No. 3808

"Sekinoff v. U. S.

"My Dear Judge:

"I beg to acknowledge receipt of your wire dated the 30th instant, and to advise you that three typewritten copies thereof have been made and filed as additional authority on behalf of plaintiff in error and a copy distributed to each of the judges

to whom the case is submitted.

"Very truly yours,

"F. D. MONCKTON, Clerk,

"By O'Brien, Deputy Clerk."

Upon this record, we think the court should now give effect to the general rule; that the construction of the borrowed law, Sec. 1894, Compiled Laws of Alaska, 1913, upon which the indictment in this case is based, should follow that given to it by the Supreme Court of Ohio in Smith v. The State, 12 Ohio State Reports, 466.

We also call attention to the record in Smith v. the State, supra, which shows that Allen G. Thurman and other leading lawyers of Ohio argued the case for the plaintiff in error before the Supreme Court of that state, while the State was represented by its Attorney General. We also cite the case of O'Meara v. State of Ohio, 17 Ohio State, 516 (518), where the Supreme Court reaffirmed its former ruling, saying:

"There is no such crime known to our law as an assault with intent to carnally know and abuse a child under ten years of age with her consent. Smith v. The State, 12 Ohio State, 466."

O'Meara v. State of Ohio, 17 Ohio State, 516.

Smith v. The State, 12 Ohio State, 466, is the leading case on the construction of this particular statute; it was reprinted in 80 Am. Dec, 355-375,

with full notes and annotations, and was cited and added with other references to the particular Ohio Statutes, to Sections 14-19, in Carter's Codes, Alaska, in 1900, showing Congress knew of and adopted Smith v. The State, supra, when adopting the statute.

We submit, then, that this court should adopt the construction of this statute which Congress adopted when, in 1899, it adopted the Statute from Ohio.

And, if the court should follow that rule, and adopt the construction of the statute given to it by the Supreme Court of Ohio, it must now, (1) grant the rehearing applied for herein, and, (2) sustain the objection and exception which plaintiff in error made to instruction numbered XIII given by the court below, and (3) also sustain the exception to the refusal of the trial judge to give "Defendant's requested instruction No. 2," and, (4) reverse the case.

(c) Relating to Assault With Intent, and Attempt.

The Alaska Section 18, in Carter's Annotated Alaska Codes, (Sec. 1898, Compiled Laws of Alaska, 1913), shows, also, by its annotations that it was borrowed bodily from Bate's Annotated Ohio Statutes, Section 6821.

The construction thereof by the Supreme Court of Ohio, prior to its adoption by Congress in 1899,

in the Penal Code of Alaska, will be binding on all Alaska courts and upon the appellate courts.

At the December Term, 1878, of the Supreme Court of Ohio, the court decided the case of Fox v. The State of Ohio, 34 Ohio State, 377, and therein laid down the rule that assault with intent to commit rape was not equivalent to an attempt to commit rape.

The plaintiff in error in that case was indicted for rape, but on the trial the jury found him not guilty of rape, but "guilty of an attempt to commit a rape." There was no law making it a crime to "attempt to commit a rape" in Ohio except the statute of which our Alaska section 1898 is an exact copy "that whoever assaults another, with intent * * * to commit rape * * * upon the person so assaulted, shall be imprisoned," etc.

The court on that record held:

"A verdict on an indictment for rape, finding the defendant not guilty of the crime charged, but guilty of an *attempt* to commit the same, is not sufficient, under seection 5, chapter 7, title 2, of the penal code (74 Ohio L. 352), to convict the defendant of an assault with intent to commit rape."

And the court further said:

"In our opinion, the verdict having failed to respond to the whole indictment in such manner as to authorize the court below either to sentence the

accused or to order his discharge, it was the duty of the court, on its own motion, to set the verdict aside, and to order a new trial. (citations). It is therefore now ordered that the verdict be set aside, and that a new trial on the indictment be granted."

Fox v. The State, 34 Ohio State, 377.

This case is cited to show that assault with intent to commit rape, and attempt to commit rape are separate and distinct offenses; and that the Alaska section 1898 (Ohio section 14) does not embrace the crime of attempt.

(d) Lesser Crimes Included in That Charged

(e) Lesser Crimes Included in That Returned

In his instruction XI the lower court charged the jury that "a section of our statute provides that in all cases of criminal prosecutions the defendant may be found guilty of any crime the commission of which is necessarily included in that with which he is charged in the indictment," and followed up with charging that assault with intent to commit rape, was such an included crime, but he did not instruct the jury that an attempt was an included crime, and he did not instruct the jury upon the lesser crimes included in assault with intent to commit rape—to-wit, assault and battery, assault, and attempt.

To this instruction exception was taken (page 157 Transcript) and assignment of error based thereon (page 168 Transcript) and the argument

on the error presented in brief of Plaintiff in error at pages 26-29.

On an indictment for murder in the first degree it would obviously be error for the court to instruct that manslaughter is an included crime, but to omit all mention of murder in the second degree, and withhold all reference to other included crimes from the jury as the trial court did in this case in his instruction numbered 14 (page 156 Transcript of Record.)

In this case the court below instructed fully on the crime of assault with intent to commit rape, which is *not* an included crime in that charged in the indictment, but wholly neglected and failed to charge that an attempt was an included crime. Assuming, as the court below did, that assault with intent to commit rape is an included crime, he did not instruct the jury that assault and battery, and assault, and attempt, are included in assault with intent, to rape. This error is presented with authorities in the brief of plaintiff in error at pages 26-31.

Stokes v. Territory, 14 Ariz, 242; 127 Pac. 742.

People v. Watson, 125 Cal, 342; 57 Pac. 1071.

Musgrave v. Territory, 12 Ariz. 123; 100 Pac. 440.

Territory v. Nichols, 3 N. M. 103; 2 Pac. 78.

State v. Vinsant, 49 Iowa 241.

Sections 2073 and 2074, Compiled Laws of

Alaska, 1913, provide for the punishment of attempts to commit crime in general provisions, and an attempt is an included offense, under 2269, to every substantive crime in the criminal code.

"Section 2269. That in all cases the defendant may be found guilty of any crime the commission of which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit such crime."

There may be substantive statutory crimes in the Alaska Penal code which do not necessarily include another crime, except an attempt, but none can be found which does not include an attempt. For instance: Sec. 1894, under which the indictment in this case was drawn, states two separate substantive crimes,—rape, *"forcibly and against her will,"* and statutory rape on a female under sixteen, *"with her consent"*; the first of these substantive crimes contains four included crimes:—attemt, assault with intent, assault and battery, and simple assault; *the second substantive crime, rape, "with her consent," contains only the single included crime of attempt.* The court, however, instructed the jury, in effect, that the second substantive crime in the section necessarily included all the included crimes of the first.

And right there is where the court erred:

(1) *Of course, an indictment may be found*

under Section 1894 *for assault with intent to commit rape upon any female over or under* 16 *years of age, forcibly and against her will, but it must be found under the first clause of that section, and not under the second.*

(2) *If an indictment is returned for rape on any female, whether over or under the age of sixteen years, forcibly and against her will, the substantive crime charged will necessarily include the lesser crimes of assault with intent to commit rape, assault and battery, simple assault, and attempt to commit rape.*

(3) *But where the substantive crime charged in the indictment is that of statutory rape, upon a girl under sixteen years of age, with her consent, as in this case, the only lesser crime necessarily included therein is attempt; the element expressed by the words "forcibly and against her will" is wholly excluded, purposely and by the plain language and logic of the law.*

(4) *Again, the indictment in this case was correctly drawn, upon the facts as the United States Attorney had them from the prosecuting witness, under the second clause of Section* 1894; *the error in the case was committed in giving an instruction on assault with intent to commit rape, which had no application to the second, but only to the first, clause of Section* 1894, *and to the substantive crime there*

charged, and refusing an instruction pointing out the error.

(8) Demurrer to the Indictment.

The plaintiff in error on the last page of the reply brief for plaintiff in error in this case demurred to the indictment against him as follows:

"Comes now the plaintiff in error, the defendant below, by James Wickersham and J. W. Kehoe, his attorneys, and demurs to the indictment in this case, and for grounds of demurrer thereto says: (1) *that the said indictment shows upon its face that it does not state facts sufficient to constitute any crime, and* (2) *because it shows upon its face that it does not state facts sufficient to constitute the crime of assault with intent to commit rape, with which crime defendant was convicted upon said indictment."*

So that it might be noticed by the judges of the court, counsel had plainly printed in large type on the front cover, and just below the words "Reply Brief for Plaintiff in Error," the words, "Demurrer to Indictment," but it was evidently not called to the attention of the court by that notice.

Section 2207, Compiled Laws of Alaska, 1913, provides:

"Sec. 2207. That when the objections mentioned in section 2202 (2199) appear upon the face of the indictment, they can only be taken by demur-

rer, except that the objection to the jurisdiction of the court over the subject of the indictment, or that the facts stated do not constitue a crime, may be taken at the trial, under the plea of not guilty and in arrest of judgment."

This section was adopted from the laws of Oregon (See Sec. 98, Carter's Annotated Codes, Alaska, 1900): The Supreme Court of the State of Oregon in the case of State v. Mack, 20 Ore. 234; 25 Pac. 639 (decided January 6, 1891, and before its adoption by Congress for Alaska) held that under that section "the objection that the facts stated in an indictment do not constitute a crime may be taken for the first time in the appellate court, and is not waived by failing to demur or move in arrest of judgment in the trial court." In a case decided April 13, 1909, the same court in State v. Martin, 100 Pac. 1106, reaffirmed the ruling in the Mack case and said:

"Where, however, it is insisted in this court for the first time, that the facts stated in the indictment do not constitute a crime, or that the trial court did not have jurisdiction of the subject matter of the offense charged, such objections can be urged, though not assigned."

This demurrer was in time and should have been noticed by the court in its opinion.

The indictment was returned against the

plaintiff in error at Juneau, Alaska, on October 11, 1921, charging that on July 1, 1921, he "did, the said Peter Sekinoff being then and there over the age of sixteen years, knowingly, wilfully, wrongfully, unlawfully, feloniously carnally know and abuse Sonia Malachoff, the said Sonia Malachoff being then and there a female person and then and there under the age of sixteen years, to-wit, of the age of eleven years, and the said Peter Sekinoff not being then and there the husband of said Sonia Malochoff."

The indictment states in its heading that it is based on "Section 1894, C. L. A.," or Compiled Laws of Alaska, 1913, which section reads as follows:

"Sec. 1894. That whoever has carnal knowledge of a female person, forcibly and against her will, *or being sixteen years of age, carnally knows and abuses a female person under sixteen years of age, with her consent, is guilty of rape.*"

Defendant was tried on October 19-20, and the jury returned a verdict of Guilty of Assault with Intent to Commit Rape. A motion for new trial was denied and he was sentenced to serve six years in the penitentiary.

Does the indictment against Sekinoff state facts sufficient to constitute a crime as defined in the second clause of Section 1894, or facts sufficient to constitute Assault with Intent to Commit Rape,

with which he was convicted? Counsel for plaintiff in error think it does not.

In our reply brief we cited the Nevada statute and the opinion in State v. Pickett, 11 Nev. 255, 21 Am. Rep. 754, Book 35 Pacific State Reports, written by Judge Beatty, as authority that such an indictment is not good.

The Nevada Section, Rev. Laws Nevada, 1912, reads as follows:

"Section 177. Rape is the carnal knowledge of a female forcibly and against her will * * * and any person of the age of sixteen years or upwards who shall have carnal knowledge of any female echild under the age of sixteen years, either with or without her consent, shall be adjudged guilty of the crime of rape, and be punished as before provided."

So far as we can ascertain that was the Nevada statute when the Pickett case arose: State v. Pickett, 11 Nev. 255; 21 Am. Rep. 754; Book 35 Pacific State Reports.

In that case as in this the trial court instructed the jury upon the elements of the crime of rape and then added:

"But if the jury believe that the defendant attempted to commit a rape and failed to effect a penetration, as above described, they should find a verdict of guilty of an assault with the intent to com-

mit rape."

The Supreme Court of Nevada held that instruction to be error, and reversed the case therefor, and said:

"The common law definition of rape is "the carnal knowledge of a woman forcibly and against her will," (4 Blacks, Com. 210). The same definition is adopted by our statute (Comp. Laws, Sec. 2350). Under this definition an assault is a necessary ingredient of every rape, or attempted rape. But it is not a necessary ingredient of the crime of carnally knowing a child under the age of twelve years, with or without her consent, which is defined in the latter part of the section, and which is called "rape." It is obvious that here are two crimes differing essentially in their nature, though called by the same name. To one force and resistance are essential ingredients, while to the other they are not essential; they may be present or absent without affecting the criminality of the fact of carnal knowledge. An assault implies force and resistance. The crime last defined may be committed, or at least attempted, without an assault, if there is actual consent on the part of the female."

State v. Pickett, supra.

And the same general principles are laid down in the case of Smith v. The State, 12 Ohio State, 466.

Alaska Section 1894 clearly defines two crimes,

as do the Ohio and Nevada Statutes, and its provisions, if carefully analyzed and understood, are logical and easily applied to the long established principles of law relating to the crime of rape.

The crime charged in the first clause of Section 1894, Alaska, is the old common law definition of rape, and an indictment must charge every element therein or it will be bad on demurrer.

The second clause charges the crime commonly known as statutory rape. The substantive crime charged in the second clause consists of four distinct elements, each of which, under the rules of law, must be affirmatively charged and averred in the indictment, and the fact proved on the trial, to secure legal conviction. These four elements are:

1. The defendant must be sixteen years old, or older,

2. He must carnally know and abuse a female person,

3. Under sixteen years of age,

4. WITH HER CONSENT.

If either of these necessary elements is lacking in the charging part of the indictment, it will not state facts sufficient to charge the crime; if the prosecution fails to prove either, the court should direct a verdict for the defendant.

The indictment in this case charges, (1) that defendant was "then and there over the age of six-

teen years," (2) that he did "carnally know and abuse, a female person," (3) "then and there under the age of sixteen years."

Now it is clear that this indictment does not attempt to charge the common law rape, for it does not allege that the act was done "forcibly and against her will." Nor does it charge statutory rape, for it does not charge that it was "with her consent." The intent of Congress in enacting the second clause of the section is clear and does not need construction. Without the act denounced in the second clause of the section is committed "with her consent" of the female, it does not charge the crime defined in the second clause. The indictment in this case does not aver that the alleged offense was committed "forcibly and against her will." It is not a good indictment, therefore, under the first clause of Sec. 1894; it does not aver that it was committed "with her consent"—it is silent on the subject of force and violence,—it may be the facts will disclose force and violence—and if so it would be bad under the second clause. How can there be certainty of averment, and how can the defendant be advised of the charge, of what proof he must meet or be ready to present, if the indictment does not aver that it was "with her consent." "With her consent" is as essential an element of the crime, under the second clause, as "forcibly and against her will" is under

the first clause. No body will pretend that an indictment under the first clause which did not aver that the rape charged was "forcibly and against her will" would be good against demurrer, and we think the rule is equally sound that the indictment under the second clause must aver that the crime there charged was committed "with her consent."

The indictment at bar does not charge that it was "forcibly and against her will," nor does it aver that it was "with her consent." Now we respectfully suggest to the court that no one can guess which clause it is attempted to be drawn under.

We think it does not state facts sufficient to constitute the crime charged in the second clause of Section 1894.

Does the indictment state facts sufficient to constitute the crime with which defendant was found guilty, to-wit, Assault with Intent to Commit rape?

What character of rape? Why the rape charged in the first paragraph of Section 1894, for that is the only rape defined by our Section 1898, which, as we have shown, was borrowed from Bate's Ann. Statutes of Ohio, Section 6821.

Our Section 14, Carter's Codes, Sec. 1898, Comp. L. Alaska, 1913, Bates Ann. Stat. Ohio, Sec. 6821, read as follows:

"Section 1898. That whoever assaults another

with intent * * * to commit rape * * * upon the person so assaulted, shall be imprisoned," etc.

The elements of such a crime have been so often defined that one may be brief. The charge imports "force and violence," and intent with force and violence to assault and rape. The cases of Smith v. The State, 12 Ohio State 466, and State v. Pickett, 11 Nev. 255, clearly point out that the statutory rape charged in the second clause of Section 1894, Alaska, lacks almost every element contained in the crime of "Assault with Intent to Commit Rape." We submit, on the authority of those two cases, and the apparent lack of the elements charged in the indictment against the defendant, that the indictment does not state facts sufficient to constitute the crime of Assault with Intent to Commit Rape, and our demurrer ought to be sustained against it on that ground.

(9) Insufficiency of the Evidence to Justify the Verdict and that the Verdict is Against the Law

In the first paragraph of its opinion this court disposed of all our objections on the insufficiency of the evidence to justify the verdict by saying that as to the hearsay statements offered on the trial by two witnesses, there was no assignment of error covering the same, and no objection taken thereto, "and as a matter of course there could have been no ruling

or exception regarding the matter."

That is correct, of course, as to the mere matter of the hearsay feature of the statements made by the two witnesses mentioned, but our argument on their statements went, or we intended it to go, to the general objection that there was "an insufficiency of the evidence to justify the verdict,"—it was a demurrer to the whole evidence, and the discussion of the hearsay feature was only one part of the argument.

A general challenge was made to the sufficiency of the evidence to justify the verdict in our motion for a new trial (page 157 Transcript of Record), an assignment of error was made to the court's action in denying it (page 174 Transcript of Record) in our XI assignment of error, and it was presented to this court, pages 7-14 in our Brief and Argument.

We understand that is sufficient to raise the objection that there was not sufficient evidence to justify the court in submitting the case to he jury—that thereby it constituted a general demurrer to the evidence. It was upon that broad theory that counsel presented this objection to the evidence, and it was not the intention to limit the objection to the hearsay feature alone. Hearsay statements, pure and simple, are not evidence, and do not justify a jury in finding a verdict against a defendant, even

though no objection is made, or ruling asked for, or exception taken; the objection can be raised, as it was in this case, in the trial court, on the general objection that there is no evidence to justify the verdict. It amounts to a failure of proof, and we submit it was fairly raised by our motion for a new trial, and excepted to, and assigned for error, and presented to this court in our brief—on that theory.

We frankly submit to this court:

1. That the second clause of section 1894, Alaska, by its clear and positive provisions, excludes from the elements of the crime defined therein every element of force and violence from which an assault with intent may be found or inferred.

2. That the indictment in this case was attempted to be drawn under that clause and does not charge or aver any fact upon which force or violence, or assault with intent, can be based or inferred.

3. That the testimony in this case does not contain any evidence tending to prove the use of any force or violence, or any assault with intent, or otherwise, directly or by inference.

4. That the instruction on assault given by the trial judge was not given to meet any definition of the statute, or any charge of the indictment, or any proofs offered on the trial, but by *mistake* in reference to the element of attempt.

Upon the whole record, then, we petition this court to grant a rehearing and reargument of the case, and at that time we shall offer for reargument the following

ERRORS OF THE LOWER COURT:

1. In holding that the crime of *attempt* to commit the crime of statutory rape was *not* necessarily included in the crime charged in the indictment.

2. In withdrawing that offense from any consideration by the jury by his instruction number 14.

3. In instructing the jury that the crime of assault with intent to commit rape was necessarily included in the crime charged in the indictment.

4. In refusing to give "defendant's requseted instruction number 2," and in refusing to instruct the jury as therein requested.

5. And, if the court shall take the view that the court below was correct in its instructions number 11 and 13, and that assault with intent to commit rape was and is necessarily included in the crime charged in the indictment, then the lower court erred in not giving full instructions to the jury in relation to the lesser crimes necessarily included in assault with intent to commit rape, to-wit, assault and battery, and simple assault.

6. The lower court erred in submitting the case to the jury, and in accepting its verdict and sen-

tencing the defendant, first, because the evidence was not sufficient to justify the verdict, and, second, because the indictment shows upon its face that it does not state facts sufficient to constitute any crime, and, third, because the indictment shows upon its face that it does not state facts sufficient to constitute the crime of assault with intent to commit rape, with which crime the defendant was convicted upon said indictment.

Wherefore, and for other reasons appearing in petitioner's briefs heretofore filed in this cause, petitioner respectfully urges that a rehearing may be granted and that the mandate of this court may be stayed pending the disposition of this petition.

That upon said rehearing, if granted, the cause be set for reargument at the term of this court late in November so that counsel for parties can be present for oral argument.

Respectfully submitted,

PETER SEKINOFF, by

Wickersham & Kehoe,
Attorneys for Petitioner.

I, James Wickersham, an attorney regularly admitted to practice in the United States Circuit Court of Appeals for the Ninth Circuit, do certify that in my opinion the foregoing Petition for Rehearing in the case of Peter Sekinoff, plaintiff in error, against the United States of America, defendant in error, No. 3808, is well founded and is not interposed for delay.

James Wickersham

Attorney for Plaintiff in Error

Dated at Juneau, Alaska,
August 24th, 1922.